Supreme Court of the United States

OCTOBER TERM, 1942.

No. 571

In the Matter

of

SURF ADVERTISING CORPORATION,

Debtor.

MAX ROCKMORE, as Trustee in Bankruptcy of Surf Advertising Corporation,

Petitioner,

MATHILDE LEHMAN and JOSEPH S. ABRAMS,

Respondents.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

DAVID HAAR,
Attorney for Petitioner.

THE COURT PRESS, N. Y. C.

INDEX.

TABLE OF CASES CITED:

OTHER AUTHORITIES CITED:

Supreme Court of the United States

OCTOBER TERM, 1942.

No.

In the Matter

of

SURF ADVERTISING CORPORATION,

Debtor.

MAX ROCKMORE, as Trustee in Bankruptcy of Surf Advertising Corporation,

Petitioner,

MATHILDE LEHMAN and JOSEPH S. ABRAMS,

Respondents.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

To the Honorable the Chief Justice and to the Associate Justices of the Supreme Court of the United States:

Your petitioner, Max Rockmore, as Trustee in Bankruptcy of Surf Advertising Corporation, Debtor, respectfully submits this petition for a writ of certiorari, for the purpose of bringing up to this Court for review a decision of the United States Circuit Court of Appeals for the Second Circuit.

As will presently appear from a recital of the facts, the controversy centered on the claim of respondent Joseph S. Abrams, that he was entitled to a fund in court. Respond-

ent Mathilde Lehman claimed only part of the fund. Your petitioner claimed he was entitled to the whole fund as Trustee of the Debtor in reorganization. The respondent Abrams' claim was based on the assertion of an "equitable lien" by virtue of certain contracts for display advertising assigned to him by the Debtor as security for advances. The fund represented the proceeds of performance of those contracts by the Debtor while it was insolvent, and performance by your petitioner as Trustee. Lehman asserted no assignment from the Debtor. Her claim to an "equitable lien" was based on an assignment of one of the contracts from an assignor of the Debtor, who originally had owned the contract, and had borrowed money on it from her.

By the decision and order sought to be reviewed (R. 374), the Circuit Court reversed its former decision (R. 329), and affirmed an order of the District Court, which it had previously reversed (R. 329). The first decision (of reversal) was not unanimous. Circuit Judge Clark dissented. In his opinion (R. 336) he suggested neither affirmance nor reversal, but indicated a desire "to return the case to the Court below for a more complete record, as well as more extensive investigation of the issue which seems to me controlling" (R. 338).

Reargument was requested by the respondents (R. 339, 342). On that reargument briefs were filed in support of a rehearing by various banking institutions, and by Reconstruction Finance Corporation, all appearing as *amici curiae* (R. 370). The Court below allowed the latter to file briefs, on their contention that the point of law involved was of the utmost importance to banking institutions in general, since the decision first made might seriously affect many bank loans which had been made on the strength of accounts receivable not then in existence, but which were to be created in the ordinary course of

business of the borrower. It was urged that if the decision stood unaltered, the bank loans were endangered, in the event that bankruptcy of the borrower intervened before the loans were repaid.

The Court considered the matter on briefs alone, treating the petition for a rehearing as granted, and thereupon reversed its former decision (R. 371). The Court adopted the views expressed by Judge Clark in his dissenting opinion "in general" (R. 371), but did not go as far as Judge Clark wanted to go, viz., to send the case back for further facts. Judge Clark had suggested the need of "a record containing definite findings as to whether these assignments were outright or for security" (R. 338). "It may well be," Judge Clark added, "that differing results may be reached in the two cases before us" (R. 338).

Besides these opinions in the Circuit Court, there was an opinion by the District Court, Hon. Vincent L. Leibell (R. 313) and also an opinion by the bankruptcy Referee, Hon. Robert P. Stephenson (R. 310). The District Court affirmed the Referee's order, but did so on a different interpretation of the inferences deducible from the facts. Since no findings were made by the Referee (the original trial Court) it will be helpful to designate the different factual inferences, and legal conclusions drawn therefrom, expressed in each of the five opinions that have been written in this case by appropriate reference, to wit: Referee Stephenson's opinion—"Ref. Op. R. "; Judge Leibell's opinion, "D. C. Op., p. "; the Circuit Courts' first majority opinion, "1st Maj. Op., R. "; Judge Clark's dissent, "Disntg. Op., R. "; the Circuit Court's opinion after reargument reversing its previous decision (now sought to be reviewed) "Reargt. Op., R. ".

Jurisdiction.

The order of affirmance was entered in the Circuit Court of Appeals on September 8, 1942 (R. 374). The jurisdiction of this Court is invoked under Section 240a of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. Section 347a).

Statement of Controversy.

The controversy was in the nature of a suit in equity tried before a Referee in bankruptcy, to determine the right to a fund of $5960 deposited in Court by Calvert Distillers Corporation. There were nine claimants to the fund (R. 8). Three were ultimately left to dispute its possession in the Circuit Court. Your petitioner claimed it because it represented moneys due to the Debtor, and to him as Trustee, for the performance of an advertising contract between Calvert and Surf, the Debtor (R. 6). Respondent Abrams claimed the money by reason of assignments by the Debtor to him of these contracts, not for performance, but as "sales" (R. 12). On reargument he changed his position and called the transaction "equitable assignments" under which "all rights of Surf passed immediately to Abrams" (R. 355).

Lehman's claim stands on a different footing. She did not claim the whole fund. She did not claim any assignment from the Debtor. She claimed an assignment from a predecessor of the Debtor, which had assigned one of these Calvert contracts to her, as security and later assigned that same Calvert contract to the Debtor.

Disregarding the differing views expressed by the Referee and the District Court as to the nature of the transactions, the Circuit Court ruled that the assignments "were given both to Abrams and Lehman as security"

(First Maj. Op., R. 332). Judge Clark refused to place any legal label on either transaction, preferring to know more about the facts (Disntg. Op., R. 338).

Lacking findings of fact, which Judge Clark thought essential to a proper determination of the issues involved (Disntg. Op., R. 338), we shall have to accept the Circuit Court's view, as originally expressed, that "Abrams' rights were those of a secured creditor and that Lehman had similar rights" (First Maj. Op., R. 334, 335). That view was not altered in the Court's decision on reargument. Indeed, that relationship of a "secured creditor" to the Debtor-borrower was emphasized in the second opinion (Reargt. Op., R. 372).

The Court changed its views as to the legal consequences of that relationship by reason of Judge Clark's opinion as to the New York law on the subject (which he admitted was "none too clear on the point at issue") (Disntg. Op., R. 336—first sentence). The following is the basic opinion of the Court below upon which it reversed itself:

> "Upon a further examination of the authorities we have become convinced that the majority opinion did not correctly interpret the New York law as applied to loans upon bilateral contracts not completely performed on either side, and the view of that law expressed in Judge Clark's dissenting opinion should in general be adopted" (Reargt. Op., R. 371).

Questions Presented.

Your petitioner respectfully suggests that the issues and questions which this decision presents, are these:

1. Assuming that the "New York law" is applicable to the facts with respect to the claims of both

Abrams and Lehman, was not the Court bound to interpret those facts in the light of the National Bankruptcy Law, as amended in 1938, instead of the "New York Law"?

2. Since the Chandler Act amended the National Bankruptcy Law with respect to "preferences" (Sect. 60a)[1] and in defining "transfers" by insolvent debtors, to creditors (Sect. 1, subd. 30)[1] does not the "New York law" yield to the federal law in the administration of an insolvent Debtor's property by a Court of Bankruptcy?

3. In view of the new definition of what constitutes "transfer" of property (Sect. 1, subd. 30),[1] and when the transfer should be deemed to have been made if possession has not been taken by the transferee before bankruptcy (Sect. 60a),[1] do not the uncontradicted facts justify the first decision awarding the fund to the petitioner, rather than the second decision which deprived him of it?

4. Was not the "New York law", as applied by the Court below, in conflict with Section 70c,[1] since the fund was "in the possession or under the control of the bankrupt at the date of bankruptcy", and, therefore, was impressed with a lien in favor of your petitioner as Trustee "as of the date of bankruptcy", superior to that of the respondents?

These are the more important issues which your petitioner believes the conflicting decisions present, and which this Court should consider and decide, because of their great importance in the administration of bankruptcy estates under the Chandler Act, amending the National Bankruptcy Law as of September 22d, 1938.

---

[1] These sections refer to the National Bankruptcy Act, as amended by Congress, effective September 22, 1938.

Statement of the Facts.

On December 7th, 1939, creditors of Surf Advertising Corporation filed an involuntary petition for reorganization against it in the United States District Court for the Southern District of New York. On December 26th, 1939, your petitioner was appointed by Judge Leibell of that Court, as trustee of the Debtor's affairs. In the interim the Debtor continued its business.

The Debtor, though a corporate entity, was in reality a business conducted by one Samuel Schub, who owned all of its issued stock (R. 25). It had been engaged in the business of outdoor display advertising for a great many years. It owned a number of large display boards in various parts of New York City, upon which national advertisers were solicited to place outdoor display advertisements of their commodities (R. 4). Samuel Schub, the owner of Surf, died on October 3, 1939 (R. 25).

One of the contracts for display advertising, was entered into on May 28, 1937, by the Debtor with Calvert Distillers Corporation. Its life was three years and would have provided a gross income of $17,400 for Surf, upon performance throughout the period of the contract (R. 4). This contract was supplemented by another one on July 28, 1937. It provided for an extension of display services on West Eighth Street and the Boardwalk, Coney Island. Calvert agreed to pay $200 a month for the first year, and $100 a month for the second and third years. In other respects the two contracts were alike (R. 13).

Another contract was entered into with Calvert on September 30, 1937. This related to display advertising on ten deluxe display boards located in New York, Connecticut and New Jersey. These contracts extended over a period of three years beginning with January 1st, 1938.

The total income from performance would have brought $27,000 to Surf, at the rate of $75 a month per board (R. 5).

The respondent Abrams had loaned money to the Debtor in connection with the conduct of its business. He had done so for about six years. The arrangements for loans and repayments were governed by a "master contract" entered into on April 2, 1934 (Ex. 14, R. 272). Generally it provided for advances to be made by Abrams to Surf on various contracts and accounts. Any deficiencies in the collection of moneys under any assignments could be collected out of any moneys that might become due to the assignor out of other assignments. This "master contract" was to cover "all accounts and contracts assigned and to be assigned hereafter" (R. 272, Ex. 14).

All the transactions that Abrams had with Surf were so had pursuant to that so-called "master contract", dated in April, 1934 (R. 248). Abrams' testimony bears this out. When Schub brought the May 28, 1937, contract in, "he made mention that it is subject to an agreement known as the general master agreement". This "master agreement" was the one dated April 2, 1934 (R. 238).

Schub assigned the $17,400 Calvert contract to Abrams on June 2, 1937 (R. 13). At that time, all Schub received was $1000 and a promised $1250 further advance before June 15, 1937. He assigned the supplemental Calvert contract on July 29, 1937 (R. 14). This involved $4800. All Abrams advanced at the time was $1700. The letter contained no promise of any further advances (R. 14). There was also an assignment of a Calvert contract by Surf to Abrams on October 1st, 1937. This involved over $27,000. (The written assignment is not in the record. Abrams had returned it to Schub, but never got it back.) Schub made another assignment on March 23, 1939. This assigned a Calvert contract amounting to $2805, for which

$1650 was advanced at the time (R. 15, 16). (The proceeds of this last mentioned contract was claimed by Lehman, and awarded to her by the Court below.)

No notice of any of these assignments was given by Abrams to Calvert at any time until after October 3, 1939, when Schub died (R. 127). The arrangement was that no notice was to be given (R. 128) but that the monthly checks paid by Calvert as rental were to be turned over to Abrams by Schub (R. 119).

Abrams filed a proof of claim in the bankruptcy court for over $22,000, owing to him by Surf (R. 156). This was alleged to be partly secured and partly unsecured.

After Schub died, a meeting of creditors was called in the office of Max E. Sanders, Esq., one of the attorneys for the petitioning creditors. That was on October 16, 1939 (R. 210). Abrams was present at the meeting (R. 210). Other creditors were also present. It was announced that the total amount of indebtedness owing by Surf was $54,150 (R. 212). Abrams said it was more. The assets consisted only of the contracts for display advertising, many of which had been assigned to five or six different creditors. If the business were to continue, and the moneys realized from the rentals, there would be only about $12,000 left to pay the $54,000 in claims (R. 213).

Abrams admitted that he knew of Surf's insolvent condition in October, 1939 (R. 173). The fund in dispute ($5960) was the result of operations from October, 1939, to July 1, 1940.

On these facts, Referee Stephenson ruled that the transaction with respect to each assignment was a "sale" (Ref. Op., R. 303). He awarded the fund (other than that claimed by Lehman) to Abrams. In the District Court Judge Leibell ruled that "technically there could not be a 'sale' of such a contract; but there could be an assign-

ment of the payments earned by Surf's labors in providing and servicing the signs" (R. 318). He sustained the order on the ground that "Abrams, as assignee, has proved superior and overriding the rights" (Dist. Ct. Op., R. 319).

In reversing this order, the Circuit Court ruled that the assignments were given to Abrams as "security" (R. 332). "Under New York law the assignments and the actual dealings between the parties created no lien against the future instalments which might become payable by Calvert to Surf or Fiegel, but at best, only created an equitable lien which would arise when the payments became due from Calvert" (R. 335).

On reargument, the Circuit Court still referred to the "New York Law" as sustaining its change of position (R. 372). The Court also expressed the opinion that "*we cannot agree with appellant's contention that Section 60a of the present Bankruptcy Act affects our decision,* and that there would be an unlawful preference as to any sums paid or payable after knowledge of insolvency" (R. 372). (Italics ours.)

Lehman's claim stands on a different basis than that of Abrams. She claims no contract with Surf. She claims no purchase from Surf. Nor did she lend any money to Surf. Her rights, if any, arise from a contract she made with Fiegel Advertising Corp., which then had a contract with Calvert, and which contract was subsequently bought by Surf.

Lehman loaned $1000 to Fiegel on June 8, 1938 (R. 29). At that time Fiegel gave her an assignment of a contract between Fiegel and Calvert for display advertising. A written assignment of the contract was executed. She also received an assignment of the lease of the premises where the display board was located (Lehman Exs. A, B, D; R. 290, 291, 292).

The assignment speaks of "security" for the repayment of the $1000 plus $23 a month for three years (R. 293). This "security" consisted of an assignment of the lease (R. 293) and the contract with Calvert. No notice of the assignment was to be given to Calvert unless there was a default in payment (R. 293).

The contract also provided that Fiegel was to turn over Calvert checks when received, "or at its option, will forward its own check for like amount" (R. 294).

The only payments received were $375 in 1938 (R. 31). Lehman notified Calvert about March, 1939, of the assignment of the contract (R. 31). Calvert made no payments after the notice of March 30, 1939.

In the meantime, Fiegel assigned this May 18, 1938 contract to Surf (R. 36). The date of the assignment is August 8, 1938 (R. 23, Ex. 5 set forth at R. 267). This contract of May 18, 1938, was assigned to Abrams on March 23, 1939 (R. 11).

There is nothing in the evidence to show that the assignment of the lease between Margaret Craig, as landlord, and Fiegel Advertising Co. as tenant, taken by Lehman as security for the $1000 loan (Lehman Ex. D, R. 296) was ever recorded as a mortgage. This is required under Section 230 of the Lien Law, if it is to be valid as a mortgage. (*First Trust & Dep. Co.* v. *Sydelco,* 249 App. Div. 285.)

On this Lehman claim, the Referee held she was entitled to recover both as against the Trustee and Abrams, mainly on the ground that she was a prior assignee, and that "a subsequent transferee gets only what the transferor has left to transfer" (Ref. Op., R. 307).

No consideration seems to have been given to the fact that Surf expended its own labor and money (some of it borrowed from Abrams) and that the Trustee did the same, all culminating in part of the $5960 in dispute.

The District Court affirmed the order subject to deductions by the Trustee for his expenses. Judge Leibell held that Lehman "purchased" an interest in the Fiegel-Calvert contract of May 18, 1938 (R. 320). "Lehman's assignment was not a transfer of property as security" (Dist. Ct. Op., R. 320).

The Circuit Court held the transfer to Lehman was given as *security* (First Maj. Op., R. 332). It agreed with the Trustee's contention that Fiegel "agreed to repay its indebtedness out of a fund to be created in the future" (First Maj. Op., R. 332).

In its opinion after reargument, the Circuit Court made no distinction between the origin of Abrams' rights as distinguished from the origin of Lehman's rights. It reversed itself as to both, based on "New York law", and declined to consider the trustee's point of the applicability of Section 60a of the present Bankruptcy Act (Reargt. Op., R. 372).

Your petitioner's claim to the fund was based on the legal and factual proposition that neither Abrams, nor Lehman, had taken possession of the money at the time of bankruptcy, December 7, 1939. The trustee's claim further was that this fund was created as a result of labor performed and money invested by the debtor prior to December 26, 1939, and also the result of labor performed and money invested by himself as trustee after December 26, 1939, and up to July 1st, 1940.

Your petitioner's rights are based on the provisions of the National Bankruptcy Act as amended in 1938, which gives the trustee the right of a lien creditor under Section 70c, and insofar as the preferences are concerned, declares a transfer to be made *immediately before the filing of the petition* if the transferee has not taken possession of the property at the time of bankruptcy (Section 60a as amended). This contention was expressly disregarded by the Court below (Reargt. Op., R. 372).

Specification of Errors and Reasons for Granting the Writ.

The Court below erred:

1. In holding that the "New York Rule" applied to the facts in this case in spite of the National Bankruptcy Act as amended in September 1938, which, according to decisions of this Court, supersede all local rules when they are in conflict with the Bankruptcy Act on the subject of title to a bankrupt's property, and the method of its distribution among creditors.

2. In holding that the contracts of assignment in evidence are enforceable as "equitable liens", good against the petitioner, regardless of Sect. 60a of the Bankruptcy Act, which defines the transfer as "perfected" "immediately before bankruptcy". The ruling should be in accordance with the amended Bankruptcy Act that the transfer became "perfected" not of the date of the agreement, but "immediately before the filing of the petition in bankruptcy" (Sec. 60a). At this time both Abrams and Lehman had reasonable cause to know that the debtor was insolvent.

3. As to Lehman's claim, the Court erred in ruling that Lehman had any claim at all against the fund, since there was no contract between the debtor and Lehman, and the mere fact that Lehman obtained alleged rights from Fiegel, by virtue of a prior assignment, does not militate against the effectiveness of the amended Bankruptcy Act with respect to the date of the transfer required to be made under the order—especially since the fund was created with Surf's labor and money and with the Trustee's labor and money.

4. The Circuit Court has decided an important question of federal law which has not been but which should be, settled by this Court.

Legal ground to support these reasons will be found in the brief annexed hereto, with the citation of authorities in support of the argument.

WHEREFORE, your petitioner respectfully prays that the petition for a writ of certiorari should be granted to the Circuit Court of Appeals for the Second Circuit, so that its decision affirming the order of the District Court upon reargument after an original reversal thereof, should be reviewed by this Court.

MAX ROCKMORE,
Petitioner.